IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1475 of 1997

to

FIRST APPEAL No 1477 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE C.K.BUCH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

UNITED INDIA INSURANCE CO LTD

Versus

HETALBHAI C BAGADIA

Appearance:

MR PV NANAVATI for Petitioner

MR DIVYESH SEJPAL, Advocate for the respondents

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE C.K.BUCH

Date of decision: 04/03/99

ORAL JUDGEMENT (Per R.K.Abichandani,J.)

The appellant Insurance Company seeks to

challenge the judgement and award made by the Motor Accident Claims Tribunal (Main), Bhavnagar on 17.12.1996 in M.A.C Petition No. 180 of 1994, 182 of 1994 and 183 of 1994, in which the claimants were awarded Rs. 4,48,000 (M.A.C Petition No. 180 of 1994), Rs. 1,48,000 (M.A.C Petition No. 182 of 1994) and Rs. 1,17,000 (M.A.C Petition No. 183 of 1994) respectively with interest. Since all the three appeals raised common questions they have been argued together by the learned Counsel.

2. The vehicular accident that resulted in the three claim petitions occurred on 12.11.1993 at about 10.00 P.M near village Bhadi on Bhavnagar-Talaja Coastal Highway. The petitions were consolidated and the evidence was recorded in M.A.C Petition No. 180 of 1994. According to the claimants, on the day of the incident, deceased Hetalbhai and two injured claimants - Rajesh and Kalpesh were travelling in a jeep which while being driven rashly and negligently and at an excessive speed, collided with a public carrier which was lying stationary. As a result of this accident, Hetalbhai, son of the claimants of M.A.C Petition No. 180 of 1994 died and the two injured claimants of the other two petitions sustained serious injuries.

The deceased Hetalbhai was of about 23 years of age and has studied upto B.Com and was at the relevant time serving with ship breakers at Alang drawing a salary of Rs. 3000 per month. He was also working for a Bombay firm and was appointed at Alang to collect iron scrap for which he was being paid Rs. 1500 per month. He was also getting commission of 1 per cent on business, if he secured business above Rs. 10 lacs. According to the claimants of M.A.C.P No. 180 of 1994, he was earning about Rs. 4500 per month and on that basis, compensation of Rs. 5,15,000 was claimed.

The claimant of M.A.C.P No. 182 of 1994 Kalpesh had sustained fractures of left shaft humerus, left clavical and ribs of the left side and sustained 10 per cent disability. According to him, he was serving as a commission agent with a firm and earning Rs. 4500 per month and have to spent Rs. 80,000 for his treatment. As per his case, he was bed ridden for a long time. A total claim of Rs. 2,61,000 was made by him.

The claimant of M.A.C.P No. 183 of 1994 Rajesh, who sustained fracture in the left leg and head injuries that resulted in 16 per cent disability to the affected limb, has made a total claim of Rs. 2 lacs including an amount of Rs. 85,000 which was spent on his treatment.

3. The Tribunal on the basis of the material on record found that the jeep driver was responsible for the accident to the extent of 80 per cent while the driver of the public carrier was responsible to the extent of 20 per cent for the accident. It was held that the accident had occurred due to their rash and negligent conduct. The Tribunal, in order to avoid any future litigation as noted in paragraph 18 of the judgement, ordered that considering 20 per cent contributory negligence of the driver of the public carrier, the proportionate amount be deducted from the claim which was accepted. The appellant was the insurer of the jeep car and therefore, it became liable to pay 80 per cent of the amount awarded by way of compensation as worked out under the award.

4. The learned Counsel appearing for the appellant when confronted with the provisions of Section 170 of the Motor Vehicles Act, 1988 and the decision of the Hon'ble the Supreme Court in Shankarayya Vs. United India Insurance Company Limited (1998) 3 S.C.C 140 and with the fact that there was no order obtained from the Tribunal during the proceedings permitting the appellant to contest the proceedings on merits, submitted that no such specific order was required and permission can be culled out from the fact that the Advocate of the Insurance Company was allowed to cross-examine the claimants' witness. He contended that all the ingredients of the provisions of Section 170 were satisfied in the instant case. He submitted that the Advocate who was engaged by the owner and driver was absent when the claimants' witness was to be cross-examined. He also pointed out that even the written statement was not filed by them. He submitted that cross-examination was permitted on the merits of the case, which shows that there was an implied permission of the Tribunal allowing the appellant Insurance Company to contest the proceedings on merits. It was also argued that the appellant claimants' lawyer advanced arguments on merits which also shows that there was an implied permission of the Tribunal under Section 170 of the Act. He argued that these contentions which he was canvassing before this Court were not projected before the Hon'ble the Supreme Court in Shankarayya's case. We find it difficult to accept that these obvious points were not before Hon'ble the Supreme Court when it held in Shankarayya's case that the Insurance Company when impleaded as a party by the Court can be permitted to contest the proceedings on merits only if the conditions precedent mentioned in Section 170 are found to be satisfied and for that purpose the Insurance Company has to obtain an order in writing from the

Tribunal and which should be a reasoned order by the Tribunal. Unless that procedure is followed, the Insurance Company cannot have a wider defence on merits than what is available to it by way of statutory defence. It was also held that the Insurance Company was joined by the claimants themselves as a party in the claim petition but that was done with a view to thrust the statutory liability on the Insurance Company on account of the contract of the Insurance. That was however, not an order of the Court itself permitting, the Insurance company which was impleaded, to avail of a larger defence on merits on being satisfied on the two conditions incorporated in Section 170. It was therefore, held that the Insurance Company was not entitled to file an appeal on merits of the claim, which was awarded by the Tribunal. There is nothing in the record of the proceedings of the present case which would even remotely indicate that the Tribunal had applied its mind for reaching a satisfaction that the conditions mentioned in Section 170 were present or made an order, much less a reasoned order, which would enable the Insurance Company to avail of a larger defence on merits. Merely because the Advocate for the Insurance Company was allowed to cross-examine the witness of the claimant, it can never be inferred therefrom that it should be treated as an order granting permission to the Insurance Company to avail of a larger defence on merits. The Insurance Company when impleaded by the claimants as a party, could have cross-examined the witness in connection with the statutory defences which were available to it and it can not be inferred from the mere fact of the Advocate for the Insurance Company having cross-examined the claimants' witness that permission as contemplated by Section 170 was thereby intended to be given by the Tribunal or that it should be treated as an order granting such permission. Furthermore, mere non-filing of the written statement by the owner and the driver would also be of no avail to the appellant. Even in Shankarayya's case, the owner and driver has not filed any written statement and there the facts were even better than the facts of the present case, since in the written statement which was filed by the Insurance Company in that case the Insurance Company had even indicated that if the owner - insurered did not choose to appear in the proceedings and contest, then the Insurance Company desired to get proper orders under Section 170 of the Motor Vehicles Act. The Insurance Company however, did not obtain such orders for getting permission of the Court for contesting the proceedings on merits. The Supreme Court also took note of the fact that the claimants did not object to the Insurance Company joining

issues on merits in the Tribunal. Therefore, just because the Advocate for the appellant Insurance Company cross-examined the claimants' witness on merits, it cannot be inferred that the Tribunal has made any implied reasoned order permitting the appellant Insurance Company to avail of a larger defence on merits of the case. There is hardly any distinction between the facts of the present case and the case before the Hon'ble Supreme Court and the gallant attempt made on behalf of the appellant by its learned Counsel that the contentions which he is now raising before this Court were not projected before the Hon'ble Supreme Court, does not lead us anywhere. Following the decision of the Hon'ble Supreme Court in Shankarayya's case, we dismiss all these three appeals summarily.

---

*/Mohandas